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26  
27 **UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF CALIFORNIA**

28 JAMES PORTER, BRYAN PEREZ, DRO  
29 ESRAEILI ESTEPANIAN, DENNIS  
30 ROMANEZ, ARTEM KUPRIJETS, NEIL  
31 KREUZER, WAFAY NADIR, and  
32 KENNETH BROWN, on behalf of  
33 themselves and all others similarly situated,

34 Plaintiffs,

35 v.

36 TESLA, INC. d/b/a TESLA MOTORS,  
37 INC.,

38 Defendant.

39 Case No. 4:23-cv-03878-YGR

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44  
45 **PLAINTIFFS' RESPONSE IN**  
**OPPOSITION TO DEFENDANT**  
**TESLA, INC.'S MOTION TO**  
**COMPEL ARBITRATION OF**  
**PLAINTIFFS' CLAIMS ON AN**  
**INDIVIDUAL BASIS**

46  
47  
48 Judge: Hon. Yvonne Gonzalez Rogers

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53 Hearing Date: January 30, 2024, at 2:00 p.m.  
54 Oakland Federal District Courthouse  
55 Courtroom 1, Fourth Floor  
56 1301 Clay Street  
57 Oakland, CA 94612

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1 **I. INTRODUCTION**

2 Plaintiffs James Porter, Bryan Perez, Dro Esraeili Estepanian, Dennis Romanez, Artem  
 3 Kupriiets, Neil Kreuzer, Wafay Nadir, and Kenneth Brown (collectively, “Plaintiffs”) bring  
 4 claims against Defendant Tesla, Inc. (“Tesla”) for the deceptive marketing of its electric vehicles.  
 5 Specifically, Plaintiffs allege that Tesla deceives the consuming public by advertising that its  
 6 electric vehicles have driving range capabilities that the vehicles do not have under normal driving  
 7 conditions. Tesla maintains this deception by displaying inflated range projections to drivers  
 8 through its software. Further, as Plaintiffs allege, when Tesla owners complain to Tesla that their  
 9 vehicles were not achieving the advertised range, Tesla engaged in a scheme to summarily dispose  
 10 of such complaints and cancel service appointments, while explaining to customers that the  
 11 advertised range of vehicles could not be achieved under normal driving conditions. Such conduct  
 12 misrepresents the true range capabilities of Tesla vehicles, inducing consumers to purchase the  
 13 vehicles—or pay more for the vehicles than they otherwise would—had Tesla truthfully  
 14 advertised the range capabilities of its vehicles under normal driving conditions.

15 Plaintiffs brought claims on behalf of themselves, a national class, and multiple state  
 16 classes, including on behalf of consumers in California, Florida, Illinois, Massachusetts, New  
 17 York, and Washington. Plaintiffs raised claims for breach of express and implied warranties,  
 18 breach of contract, fraud, negligent misrepresentation, unjust enrichment, and for violation of  
 19 various state consumer protection laws, including under California’s Consumer Legal Remedies  
 20 Act (“CLRA”), Unfair Competition Law (“UCL”), and False Advertising Law (“FAL”), among  
 21 other state law violations. Through their claims, Plaintiffs seek damages, restitution, and  
 22 injunctive relief to enjoin Tesla’s continuing deceptive conduct against the general public.

23 Tesla moves to compel Plaintiffs “to pursue their unmeritorious claims . . . in individual  
 24 arbitration proceedings pursuant to their agreements with Tesla,” in an effort to avoid classwide  
 25 liability for its deceptive conduct. Def.’s Mot. to Compel Arbitration (“Def.’s Br.”), ECF No. 43,  
 26

1 at 1.<sup>1</sup> Putting aside Tesla’s assertion that Plaintiffs’ claims are “unmeritorious”—a contention for  
 2 which Tesla provides no support in its motion, and with which Plaintiffs strongly disagree—  
 3 Tesla’s motion must be denied. A review of the Arbitration Provision at issue is dispositive. The  
 4 Arbitration Provision improperly and unlawfully deprives Plaintiffs (and any other consumer  
 5 seeking to order or purchase a Tesla vehicle) from seeking public injunctive relief in any forum.  
 6 The provision, therefore, violates the California Supreme Court’s decision in *McGill v. Citibank*,  
 7 N.A., 2 Cal. 5th 945 (2017). Since that decision, when reviewing numerous arbitration provisions  
 8 similar to Tesla’s here—all of which seek to restrict a consumer’s ability to seek public injunctive  
 9 relief and to bring a representative action—multiple courts have upheld the *McGill* rule of  
 10 ensuring a forum for representative action on behalf of the general consuming public. Indeed, two  
 11 courts have already determined that Tesla’s Arbitration Provision violates *McGill*. See *Nguyen v.*  
 12 *Tesla, Inc.*, No. 819CV01422JLSJDE, 2020 WL 2114937 (C.D. Cal. Apr. 6, 2020) and *Lee v.*  
 13 *Tesla, Inc.*, No. SACV2000570JVSKESX, 2020 WL 10573281 (C.D. Cal. Oct. 1, 2020). This  
 14 Court should reach the same result.

15 Because Tesla’s Arbitration Provision violates California law, the Court should deny  
 16 Tesla’s Motion to Compel Arbitration. At a minimum, the Court should sever Plaintiffs’ claims  
 17 under the CLRA, UCL, and FAL—because these claims seek public injunctive relief on behalf  
 18 of California’s general public—and allow these claims to continue to be litigated in this Court.

19 **II. FACTUAL BACKGROUND**

20 Between December 2020 and May 2023, Plaintiffs all purchased their vehicles new from  
 21 Tesla. See First Am. Class Action Compl. (“FAC”), ¶¶ 12-19. Each of the Plaintiffs considered  
 22 the range capabilities of Tesla vehicles to be one of the most important factors when choosing to  
 23 purchase their Tesla vehicles. *Id.* ¶¶ 136, 148, 159, 171, 183, 196, 210, 220. Moreover, each of  
 24

25 <sup>1</sup> Citations to the pages of electronically filed documents are to the page of the document itself,  
 26 rather than to the page assigned by the Court’s electronic filing system.

1 the Plaintiffs purchased their vehicles based on Tesla's misrepresentations regarding the range  
 2 capabilities of the Tesla vehicles. *See id.* ¶¶ 127-222. As Plaintiffs allege, had Tesla truthfully  
 3 revealed the actual range capabilities of Tesla vehicles prior to their purchase, they either would  
 4 not have purchased their vehicles, or else would have paid substantially less for them. *Id.* ¶¶ 137,  
 5 149, 160, 172, 184, 197, 211, 221.

6 All Plaintiffs purchased their Tesla vehicles by ordering the vehicles on Tesla's website.  
 7 In doing so, each of the Plaintiffs signed an Order Agreement. *See* Sinha Decl., ECF No. 43-3,  
 8 ¶ 4. Multiple versions of the Order Agreement exist, but each contains an "Agreement to  
 9 Arbitrate" (the "Arbitration Provision"), which remains materially identical across both relevant  
 10 versions (with one notable exception). The earlier version of the Order Agreement, which applied  
 11 prior to its revision in June 2022, was signed by Plaintiffs Porter, Perez, Estepanian, Romanez,  
 12 Kreuzer, and Nadir. *See* Ahluwalia Decl., ECF No. 44, ¶¶ 4-7, 9-10. This version provided in  
 13 relevant part:

14 **Agreement to Arbitrate.** Please carefully read this provision, which applies to any  
 15 dispute between you and Tesla, Inc. and its affiliates, (together "Tesla").  
 16 \* \* \*

17 [Y]ou agree that any dispute arising out of or relating to any aspect of the  
 18 relationship between you and Tesla will not be decided by a judge or jury but  
 19 instead by a single arbitrator in an arbitration administered by the American  
 20 Arbitration Association (AAA) under its Consumer Arbitration Rules. This  
 21 includes claims arising before this Agreement, such as claims related to statements  
 22 about our products.

23 \* \* \*

24 The arbitrator may only resolve disputes between you and Tesla, and may not  
 25 consolidate claims without the consent of all parties. *The arbitrator cannot hear*  
*class or representative claims or requests for relief on behalf of others purchasing*  
*or leasing Tesla vehicles.* In other words, you and Tesla may bring claims against  
 26 the other only in your or its individual capacity and not as a plaintiff or class  
 27 member in any class or representative action. *If a court or arbitrator decides that*  
*any part of this agreement to arbitrate cannot be enforced as to a particular claim*  
*for relief or remedy, then that claim or remedy (and only that claim or remedy)*  
*must be brought in court and any other claims must be arbitrated.*

28 \* \* \*

29 You may opt out of arbitration within 30 days after signing this Agreement by  
 30 sending a letter to: Tesla, Inc.; P.O. Box 15430; Fremont, CA 94539-7970, stating

1 your name, Vehicle Identification Number, and intent to opt out of the arbitration  
 2 provision. *If you do not opt out, this agreement to arbitrate overrides any different*  
 3 *arbitration agreement between us, including any arbitration agreement in a lease*  
 4 *or finance contract.*

5 *See id.*, Exs. 1-4, 6-9 (emboldened and italicized emphases added). The later version of the Order  
 6 Agreement was signed by Plaintiffs Kupriets and Brown. As noted, although the “Agreement to  
 7 Arbitrate” remained materially identical in both versions, there was one notable exception. The  
 8 revised Order Agreement now made clear that the court—not the arbitrator—must determine  
 9 issues of arbitrability: “You further agree that any disputes related to the arbitrability of your  
 10 claims will be decided by the court rather than an arbitrator, notwithstanding AAA rules to the  
 11 contrary.” *See id.*, Ex. 5, at 3; Ex. 10, at 3.

12 None of the Plaintiffs opted out of the respective arbitration provisions. Thus, both the  
 13 2021 and 2022 Order Agreements’ arbitration provisions control and “override” the subsequent  
 14 Sales Agreements entered into with Tesla, and any arbitration agreement in the Sales Agreements  
 15 is, per the terms of the Order Agreement, irrelevant and not controlling. *See, e.g., id.*, Ex. 1, at 3;  
 16 Ex. 5, at 3 (“If you do not opt out, this agreement to arbitrate overrides any different arbitration  
 17 agreement between us, including any arbitration agreement in a lease or finance contract”).

### III. LEGAL STANDARD

18 The provides that agreements to arbitrate “shall be valid, irrevocable, and enforceable,  
 19 save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C.  
 20 § 2. “The final clause of § 2, its savings clause, ‘permits agreements to arbitrate to be invalidated  
 21 by generally applicable contract defenses, such as fraud, duress, or unconscionability,’ but not by  
 22 defenses that apply only to arbitration or that derive their meaning from the fact that an agreement  
 23 to arbitrate is at issue.” *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425, 432 (9th Cir. 2015)  
 24 (quoting *AT & T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1746 (2011)). The Ninth Circuit  
 25 has made clear that “the *McGill* rule is a generally applicable contract defense derived from long-  
 26

1 established California public policy” and “a ground for the revocation of any contract.” *Blair v.*  
 2 *Rent-A-Center, Inc.*, 928 F.3d 819, 828 (9th Cir. 2019).

3 The United States Supreme Court recently held that the FAA prohibits courts from  
 4 adopting any “special, arbitration-preferring procedural rules” that “tilt the playing field in favor  
 5 of (or against) arbitration.” *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1713-14 (2022). This new  
 6 precedent is significant because it supersedes prior case law suggesting that there is a liberal  
 7 policy in favor of arbitration, or that the FAA requires the court to construe contracts in favor of  
 8 arbitration. *Id.* at 1713 (clarifying that the pro-arbitration “federal policy is about treating  
 9 arbitration contracts like all others, not about fostering arbitration”). Rather, a court must consider  
 10 an arbitration clause just as it would consider any other contract term. *Id.* (“Accordingly, a court  
 11 must hold a party to its arbitration contract just as the court would to any other kind. But a court  
 12 may not devise novel rules to favor arbitration over litigation.”); *see also Armstrong v. Michaels*  
 13 *Stores, Inc.*, 59 F.4th 1011, 1015 (9th Cir. 2023) (recognizing in light of *Morgan*’s holding, “that  
 14 there is no longer a thumb on the scale in favor of arbitration”).

15 **IV. ARGUMENT**

16 Plaintiffs’ claims are not subject to arbitration because both the 2021 and 2022 versions  
 17 of Tesla’s Order Agreements that Plaintiffs signed violate *McGill* and are unenforceable because  
 18 the Arbitration Provisions deprive consumers of the right to seek public injunctive relief.

19 **A. The Court Must Decide the Question of Arbitrability.**

20 As an initial matter, the question of whether Tesla’s Arbitration Provision is enforceable  
 21 must be answered by this Court. Despite the provision’s clear language, Tesla argues to the  
 22 contrary. Def.’s Br. 19-22. Tesla asserts that those Plaintiffs who signed the 2021 version of the  
 23 Order Agreement—that is, Plaintiffs Porter, Estepanian, Perez, Romanez, Kruezer, and Nadir—  
 24 have necessarily conceded that arbitrability should be decided by the arbitrator, because the  
 25 Arbitration Provision in the 2021 Order Agreement incorporated AAA rules. *See id.* at 19-21. But  
 26 the incorporation of AAA’s Consumer Arbitration Rules was not “clear and unmistakable,” as  
 27

1 Tesla suggests. *Id.* at 19. If anything, this attempted delegation was thwarted by the Arbitration  
 2 Provision's inclusion of a materially *conflicting* clause, which explicitly contemplates preserving  
 3 questions of arbitrability for the court:

4 *If a court or arbitrator decides that any part of this agreement to arbitrate cannot  
 5 be enforced as to a particular claim for relief or remedy, then that claim or remedy  
 6 (and only that claim or remedy) must be brought in court and any other claims must  
 be arbitrated.*

7 *See* Ahluwalia Decl., Ex. 11, at 4 (emphasis added).

8 Indeed, Tesla's argument directly contradicts a court's recent determination that this very  
 9 language gave the court—not the arbitrator—the authority to determine arbitrability. Very  
 10 recently, Judge Haywood S. Gilliam, Jr. of the Northern District of California reviewed this same  
 11 language and rejected Tesla's argument that its incorporation of the AAA rules was sufficient to  
 12 delegate arbitrability given the "inherent tension" in Tesla's arbitration provision. *In re Tesla*  
 13 *Driver Assistance Systems Litig.*, No. 22-cv-05240-HSG, 2023 WL 6391477 at \*5-6 (N.D. Cal.  
 14 Sept. 30, 2023). The court explained:

15 Although incorporation of the AAA rules may on its own constitute "clear and  
 16 unmistakable evidence" of the parties' intent to delegate arbitrability issues, the  
 17 arbitration agreement here leaves open the possibility that a court could decide such  
 18 issues too. The Court is not persuaded by Defendant's suggestions that these  
 provisions should be read in isolation, and they provide no rationale for how to  
 harmonize them.

19 *Id.* at \*6. This Court should similarly conclude that it is impossible to reconcile Tesla's express  
 20 provision that permits arbitrability issues to be decided by "a court or arbitrator," and such  
 21 language defeats any "clear and unmistakable evidence" of an intent to delegate arbitrability. *See*  
 22 also *Jack v. Ring LLC*, 91 Cal. App. 5th 1186, 1199 (Cal. Ct. App. 2023) (finding arbitration  
 23 provision ambiguous where express delegation clause conflicted with severability clause and  
 24 holding that because "the arbitration provision points in two directions on the question whether a  
 25 court or an arbitrator is to decide the enforceability of the agreement to arbitrate . . . we cannot  
 26 conclude the parties clearly and unmistakably delegated to the arbitrator exclusive authority to

1 decide whether the arbitration provision is valid under *McGill*”); *id.* at 1201-02 (finding “the  
 2 reference to the JAMS Rules does not cure the ambiguity created by the severability clause/poison  
 3 pill”). And although Tesla asserts that courts have already found that this Order Agreement  
 4 delegated arbitrability through incorporation of the AAA rules, neither of those decisions  
 5 discussed the material conflict Plaintiffs (and Judge Gilliam) identify herein. *See, e.g.*, Schrader  
 6 Decl., ECF No. 43-2, Ex. A (*Lambrix Order*); *see also Hiatt v. Tesla Inc.*, No. 21-00098 LEK-  
 7 KJM, 2021 WL 6052266 at \*4 (D. Haw. 2021). Courts that have directly considered this  
 8 question—either in similar agreements or in Tesla’s own arbitration provision—have squarely  
 9 rejected Tesla’s position.

10 Further, while Tesla is correct that the Ninth Circuit has recognized that incorporation of  
 11 the AAA rules *could* be “clear and unmistakable evidence” of delegation, *see* Def.’s Br. 20 (citing  
 12 *Brennan v. Opus Bank*, 796 F.3d 1125, 1130 (9th Cir. 2015)), “[w]here at least one party is  
 13 unsophisticated, judges *in this district* routinely find that the incorporation of the AAA rules is  
 14 insufficient to establish a clear and unmistakable agreement to arbitrate arbitrability.” *Magill v.*  
 15 *Wells Fargo Bank, N.A.*, No. 4:21-cv-01877-YGR, 2021 WL 6199649, \*5 (N.D. Cal. June 25,  
 16 2021) (Gonzalez Rogers, J.) (emphasis added) (rejecting that incorporation of AAA rules clearly  
 17 and unmistakably delegated issues of arbitrability because bank customers “could not be expected  
 18 to understand that the incorporation of the AAA rules would mean that the overwhelming majority  
 19 of disputes arising out of the Account Agreement would be resolved by an arbitrator”); *Eiess v.*  
 20 *USAA Fed. Sav. Bank*, 404 F. Supp. 3d 1240, 1253 (N.D. Cal. 2019) (noting that, “[f]or an  
 21 unsophisticated plaintiff to discover she had agreed to delegate questions of arbitrability, she  
 22 would need to locate the arbitration rules at issue, find and read the relevant rules governing  
 23 delegation, and then understand the importance of a specific rule granting the arbitrator  
 24 jurisdiction over questions of validity—a question the Supreme Court itself has deemed ‘rather  
 25 arcane’” (citation omitted)); *Ingalls v. Spotify USA, Inc.*, No. C 16-03533-WHA, 2016 WL  
 26 6679561, \*3-4 (N.D. Cal. Nov. 14, 2016) (noting that “every district court decision in our circuit  
 27

1 to address the question since *Brennan* has held that incorporation of the AAA rules was  
 2 insufficient to establish delegate arbitrability in consumer contracts involving at least one  
 3 unsophisticated party”); *Tompkins v. 23andMe, Inc.*, No. 5:13-CV-05682-LHK, 2014 WL  
 4 2903752, at \*11-12 (N.D. Cal. June 25, 2014) (holding incorporation of AAA rules was  
 5 insufficient to establish delegation in contract between a DNA testing service and individual  
 6 consumers).

7 This same argument, however, does not apply to Plaintiffs Kupriets and Brown, who  
 8 signed the 2022 Order Agreement. The Arbitration Provision in that agreement expressly provides  
 9 that “disputes related to the arbitrability of your claims will be decided *by the court rather than*  
 10 *the arbitrator*, notwithstanding AAA rules to the contrary.” *See Ahluwalia Decl.* ¶¶ 8, 11; Ex. 5,  
 11 at 3; Ex. 10, at 3 (emphasis added). And Tesla admits this. Def.’s Br. 19-20 n.8; *see also id.* at 7.  
 12 Nevertheless, Tesla contends that Plaintiff Kupriets agreed to delegate arbitrability by way of the  
 13 Sales Agreement. Def.’s Br. 21-22.<sup>2</sup> The Court can easily dispose of this argument because the  
 14 Arbitration Provision in the Order Agreement clearly and explicitly “overrides” the Arbitration  
 15 Provision within the Sale Agreement. *See Ahluwalia Decl.*, Ex. 5, at 3.<sup>3</sup>

16 Thus, in the absence of a “clear and unmistakable” intent to delegate, all questions of  
 17 arbitrability are for this Court alone.

18 **B. Tesla’s Arbitration Provision in Its 2021 and 2022 Order Agreements  
 19 Improperly Deprives Consumers of the Right to Seek Public Injunctive Relief  
 20 in Any Forum and Is Therefore Unenforceable Under *McGill*.**

21 Tesla’s 2021 and 2022 Order Agreements impermissibly deprive Plaintiffs of their right  
 22 to seek public injunctive relief—in both arbitration and in court—and they, thus, run afoul of the

23 <sup>2</sup> Tesla also asserts Plaintiffs Porter, Estepanian, and Nadir have delegated the determination of  
 24 arbitrability to the arbitrator through their signing of a Tesla Sale Agreement. Def.’s Br. 21-22.

25 <sup>3</sup> The Arbitration Provision in the Order Agreements Plaintiffs Porter, Estepanian, and Nadir  
 26 signed likewise explicitly “override” that within the Sale Agreement. *See Ahluwalia Decl.*, Ex. 1,  
 at 3; Ex. 3, at 6; 9, at 3.

1 California Supreme Court’s decision in *McGill*. As such, Tesla’s Arbitration Provision must be  
 2 held unenforceable, allowing the entirety of Plaintiffs’ claims seeking such relief to continue to  
 3 be litigated in this Court.

4 **1. *McGill* prohibits waivers of the right to seek public injunctive relief in  
 5 any forum.**

6 In *McGill*, the Supreme Court of California unanimously held that a contract provision  
 7 purporting to prevent a consumer from seeking public injunctive relief in any forum is  
 8 unenforceable. “Public injunctive relief” is relief that “has the primary purpose and effect of  
 9 prohibiting unlawful acts that threaten future injury to the general public.” *McGill*, 2 Cal. 5th at  
 10 951. The issue before the court was whether the arbitration provision in question “is valid and  
 11 enforceable insofar as it purports to waive [plaintiffs’] right to seek public injunctive relief *in any*  
 12 *forum*.” *Id.* at 956 (emphasis in original). After finding that the complaint did, in fact, seek public  
 13 injunctive relief, and that such relief was available under the CLRA, UCL, and FAL, the court  
 14 concluded that the “arbitration provision here at issue is invalid and unenforceable under state  
 15 law insofar as it purports to waive [plaintiffs’] statutory right to seek such relief.” *Id.* at 958-61.

16 To reach this result, the court relied on California Civil Code § 3513, which provides that  
 17 “a law established for a public reason cannot be contravened by private agreement.” *Id.* at 961  
 18 (citing Cal. Civ. Code § 3513). The court explained that because the relief available under the  
 19 CLRA, UCL, and the FAL is “primarily for the benefit of the general public,” any waiver of the  
 20 right to seek public injunctive relief under those statutes “would seriously compromise the public  
 21 purposes the statutes were intended to serve.” *Id.* Accordingly, under *McGill*, “a provision in any  
 22 contract—even a contract that has no arbitration provision—that purports to waive, in all fora,  
 23 the statutory right to seek public injunctive relief under the UCL, the CLRA, or the [FAL] is  
 24 invalid and unenforceable under California law.” *McGill*, 2 Cal.5th at 962.

25 The Ninth Circuit subsequently affirmed the *McGill* ruling in *Blair*, 928. F.3d at 828. In  
 26 *Blair*, the plaintiff entered into an agreement with Rent-A-Center to rent household items through

1 set installment payments, and after all payments are made on time or if the consumer is able to  
 2 pay the full cash price early, the consumer takes ownership of the item. *Id.* at 822. The plaintiff  
 3 challenged this practice by asserting that Rent-A-Center charged total payment and cash price  
 4 amounts that far exceeded the price of the items, in violation of various consumer protection laws.  
 5 *Id.* at 822-23. The plaintiff sought public injunctive relief. *Id.* at 823. However, the arbitration  
 6 provision in the agreement stated that “[t]here will be no right or authority for any dispute to be  
 7 brought, heard, or arbitrated as a class, collective, mass, private attorney general, or representative  
 8 action.” *Id.* at 823. The Ninth Circuit denied the defendant’s motion to compel arbitration based  
 9 on its ruling that “[t]he *McGill* rule is a generally applicable defense derived from long-  
 10 established California public policy. It is a ‘ground[] . . . for the revocation of any contract’ and  
 11 falls within the FAA’s savings clause at the first step of the preemption analysis,” which “permits  
 12 agreements to arbitrate to be invalidated by generally applicable contract defenses.” *Id.* at 825,  
 13 828 (citing 9 U.S.C. § 2).

14 The Ninth Circuit issued similar opinions in *McArdle v. AT&T Mobility, LLC*, 772 Fed.  
 15 App’x 575 (9th Cir. 2019), *cert. denied*, No. 19-1078, 140 S. Ct. 2827 (U.S. June 1, 2020)  
 16 (concurrently filed opinion adopting holding in *Blair*); *see also Tillage v. Comcast Corp.*, 772  
 17 Fed. App’x 569 (9th Cir. 2019), *cert. denied*, No. 19-1066, 140 S. Ct. 2827 (U.S. June 1, 2020)  
 18 (same). The defendants unsuccessfully sought certiorari review by the Supreme Court of the  
 19 United States in *McArdle* and *Tillage*. The Supreme Court’s denial of certiorari leaves the *McGill*  
 20 rule intact and binding on courts within the Ninth Circuit.

21 Tesla likely will attempt to argue that the United State Supreme Court’s recent decision  
 22 in *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906 (2022), overruled *McGill* or abrogated  
 23 *Blair*. But this is not the case, and the Court should reject such an argument. In *Viking River*, the  
 24 Supreme Court reviewed California’s Private Attorneys General Act (“PAGA”), Cal. Lab. Code  
 25 § 2698, *et seq.*, which provides employees the authority to sue their employer on a representative  
 26 basis, and the subsequent California rule that held arbitration agreements that purport to waive  
 27

1 this PAGA right were unenforceable, *Iskanian v. CLS Transp. L.A., LLC*, 59 Cal. 4th 348, 383  
2 (2014). *Viking River*, 142 S. Ct. at 1919-20. The Supreme Court abrogated *Iskanian* by holding  
3 “*Iskanian*’s rule that PAGA actions cannot be divided into individual and non-individual claims  
4 is preempted” because it “unduly circumscribes the freedom of parties to determine the issues  
5 subject to arbitration” where “[t]he only way for parties to agree to arbitrate *one* of an employee’s  
6 PAGA claims is to also agree to arbitrate *all other* PAGA claims in the same arbitral proceeding.”  
7 *Id.* at 1913, 1923-34 (citations and internal quotation marks omitted). What *Viking River* did *not*  
8 address was whether a request for public injunctive relief was arbitrable, or whether to overturn  
9 or abrogate *McGill*, *Blair*. The factual circumstances at issue here, and the law governing them,  
10 are separate and apart from those the *Viking River* Court considered. Indeed, courts in this district  
11 have repeatedly, and correctly, held that *Viking River* had zero impact on either *McGill* or *Blair*.  
12 See, e.g., *McBurnie v. Acceptance Now, LLC*, No. 3:21-cv-01429-JD, 2022 WL 17342195, at \*4  
13 (N.D. Cal. Nov. 30, 2022), *appeal filed* Dec. 6, 2022 (denying arbitration on waiver grounds, in  
14 part, because defendant’s “suggestion that *Viking River* effected a sea change in the enforceability  
15 of the arbitration agreement [under *McGill* and *Blair*] is questionable at best” because “*Viking*  
16 *River* abrogated a different California rule that invalidated agreements to arbitrate only individual  
17 PAGA claims for Labor Code violations” and “*McGill* did not involve PAGA or present the same  
18 ostensible dilemma”); *MacClelland v. Cellco P’ship*, 609 F. Supp. 3d 1024, 1038-39 (N.D. Cal.  
19 2022), *appeal filed* July 13, 2022 (finding arbitration provision in wireless service customer  
20 agreement prohibiting public injunctive relief was substantively unconscionable and  
21 unenforceable under *McGill* overrules or undermines *McGill*’s core holding that an arbitration  
22 agreement cannot prohibit a party from seeking public injunctive relief in any forum”).

## 2. Tesla's arbitration provision is unenforceable under *McGill*.

24 Tesla's Arbitration Provision broadly requires the arbitration of "any dispute arising out  
25 of or relating to any aspect of the relationship" between Plaintiffs and Tesla only:

1 **Agreement to Arbitrate.** Please carefully read this provision, which applies to any  
 2 dispute between you and Tesla, Inc. and its affiliates, (together “Tesla”). . . . you  
 3 agree that any dispute arising out of or relating to any aspect of the relationship  
 4 between you and Tesla will not be decided by a judge or jury but instead by a single  
 5 arbitrator in an arbitration. . . . This includes claims arising before this Agreement,  
 6 such as claims related to statements about our products.

7 *E.g.*, Ahluwalia Decl., Ex. 1, at 3 (2021 Order Agreement); Ex. 5, at 3 (2022 Order Agreement).  
 8 A plain reading of the Arbitration Provision demonstrates that it compels *all* disputes to  
 9 arbitration—even those seeking public injunctive relief as a remedy. And Tesla does not dispute  
 10 that the Arbitration Provision would do just that. *See* Def.’s Br. 22-23.

11 Further, the Order Agreements contain a waiver that expressly bars an arbitrator from  
 12 resolving such disputes that are representative in nature and restricts the arbitrator’s ability to  
 13 award public injunctive relief:

14 The arbitrator may only resolve disputes between you and Tesla, and may not  
 15 consolidate claims without the consent of all parties. *The arbitrator cannot hear*  
 16 *class or representative claims or requests for relief on behalf of others purchasing*  
 17 *or leasing Tesla vehicles. In other words, you and Tesla may bring claims against*  
 18 *the other only in your or its individual capacity and not as a plaintiff or class*  
 19 *member in any class or representative action.* If a court or arbitrator decides that  
 20 any part of this agreement to arbitrate cannot be enforced as to a particular claim  
 21 for relief or remedy, then that claim or remedy (and only that claim or remedy) must  
 22 be brought in court and any other claims must be arbitrated.

23 *E.g.*, Ahluwalia Decl., Ex. 1, at 3 (2021 Order Agreement); Ex. 5, at 3 (2022 Order Agreement)  
 24 (emphasis added). Reading these provisions clearly demonstrates that the Arbitration Provision  
 25 improperly waives Plaintiffs’ right to seek public injunctive relief in any forum.

26                   a. **Tesla’s arbitration provision improperly waives the right to**  
 27 **seek public injunctive relief in any forum.**

28 *McGill* is controlling and invalidates the Arbitration Provision in this case. Tesla’s  
 29 Arbitration Provision explicitly limits the arbitrator from making decisions or awarding relief that  
 30 benefits anyone other than Plaintiffs: “The arbitrator cannot hear class or representative claims or  
 31 requests for relief on behalf of others.” *Id.* Combined with the requirement that “any dispute

1 arising out of or relating to any aspect of the relationship” between Plaintiffs and Tesla,  
 2 “includ[ing] claims arising before this Agreement,” the Arbitration Provision violates *McGill*  
 3 because it waives Plaintiffs’ right to seek public injunctive relief in any forum. *Id.*

4 The overwhelming majority of courts that have reviewed arbitration provisions containing  
 5 the same or substantially similar operative language—including two California district courts who  
 6 already held that Tesla’s Arbitration Provision violated *McGill*—have concluded that similar  
 7 arbitration provisions that bar representative, class, and collective actions and limit the arbitrator  
 8 to awarding relief on an individual basis only are unenforceable because they prohibit the right to  
 9 seek public injunctive relief. *See, e.g., Nguyen*, 2020 WL 2114937 at \*5 (holding that “[a]lthough  
 10 [Tesla’s] provision does not say so explicitly, its various proscriptions combine to preclude  
 11 consumer-signatories from seeking public injunctive relief *in any forum*, rendering the provision  
 12 unenforceable under *McGill*); *Lee*, 2020 WL 10573281 at \*7-8 (concluding the same provision  
 13 to be “void” and against public policy as to California plaintiffs under *McGill*); *MacClelland*, 609  
 14 F. Supp. 3d at 1037 (holding arbitration provision with language that “preclude[ed] injunctive  
 15 relief benefitting anyone other than the individual claimant . . . prevents Plaintiff from seeking  
 16 public injunctive relief in any forum, a right which cannot be denied whether in arbitration or  
 17 otherwise”); *Blair*, 928 F.3d at 823 (finding agreement barred public injunctive relief in any forum  
 18 when it provided that arbitration “shall be conducted on an individual basis” and prohibited the  
 19 arbitrator from awarding relief that would “affect [individuals] other than you”); *McArdle v.*  
 20 *AT&T Mobility LLC*, No. 09-cv-01117-CW, 2017 WL 4354998, at \*4-5 (N.D. Cal. Oct. 2, 2017)  
 21 (finding agreement providing that the arbitrator could “award declaratory or injunctive relief only  
 22 in favor of the individual party seeking relief and only to the extent necessary to provide relief  
 23 warranted by that party’s individual claim,” when read “[i]n combination with the agreement . . .  
 24 that all claims and disputes, broadly defined, would be arbitrated, . . . constitutes a waiver of  
 25 public injunctive relief in all for a that violates the *McGill* rule”), *aff’d mem.* 772 Fed. App’x 575  
 26 (9th Cir. 2019). Each of these decisions, which involved either identical or similar language to  
 27

1 that used by Tesla, compels a finding that Tesla’s Arbitration Provision squarely violates *McGill*  
2 by improperly waiving the right to seek public injunctive relief in any forum.

Indeed, in a tacit recognition of the fact that its arbitration provision does not allow an arbitrator to award public injunctive relief, Tesla notably did not move to compel arbitration in the related *Corona* case, which seeks only public injunctive relief, even though an agreement to arbitrate almost certainly exists with those plaintiffs as well. *See Corona v. Tesla, Inc.*, No. 4:23-cv-03902-YGR (N.D. Cal.), ECF No. 26 (moving to dismiss but not bringing a motion to compel arbitration). Because Tesla’s Arbitration Provision compels all claims to arbitration, yet only allows Plaintiffs to pursue relief individually in that forum, the provision bars Plaintiffs’ right to seek public injunctive relief in any forum and therefore violates *McGill*. It must be invalidated.

b. Plaintiffs seek public injunctive relief on behalf of the general public.

13 As the Ninth Circuit held in *Blair*, an injunction under the UCL or CLRA that seeks “the  
14 elimination of deceptive practices” is, by definition, “public injunctive relief.” *Id.* at 824. Here,  
15 Plaintiffs’ First Amended Complaint includes requests for injunctive relief under California law  
16 to prevent Tesla from continuing to deceive and mislead both current and prospective Tesla  
17 owners—that is, the general public—about its vehicles’ driving range, which is “relief oriented  
18 to and for the benefit of the general public.” *See id.* at 831 n.3; *see also*, e.g., FAC, ¶¶ 228, 230,  
19 241, 251;<sup>4</sup> *id.* at 80 (Prayer for Relief). The FAC establishes that “Tesla made material  
20 misrepresentations and omission of fact in its advertising and marketing of the Tesla vehicles by  
21 exaggerating the range capabilities of its electric vehicles,” which had “the effect of deceiving  
22 consumers into believing that the vehicles have a much greater vehicle range than what could be

24 <sup>4</sup> Beginning on page 52 in the FAC, following Paragraph 272, the subsequent paragraphs are  
25 numbered beginning at 202—an error which later repeats. Plaintiffs refer to Paragraphs 228, 230,  
26 241, and 251, on pages 57, 59, and 61. Plaintiffs will refer to relevant paragraphs by their paragraph  
number (even if incorrectly numbered) and the page of the FAC on which they appear, so as to  
avoid all confusion.

1 achieved under normal driving conditions.” *Id.* ¶¶ 203-04 (at p. 53). The FAC describes how  
 2 Tesla represents its vehicles’ driving ranges (falsely) to the consuming public through its website  
 3 and vehicle order webpages. *See id.* ¶¶ 33-45. Moreover, Tesla displays real-time range estimates  
 4 for drivers on the vehicle’s computer display. *Id.* ¶¶ 46-49. But, again, Tesla misrepresents the  
 5 range to drivers, providing a “rosy” projection that is not based on real-time, normal driving  
 6 conditions. *See id.* ¶¶ 67-71. Tesla has continued to engage in this deceptive conduct even after  
 7 regulators have found that they misled consumers based on this same “false/exaggerated  
 8 advertising.” *Id.* ¶¶ 82-84 (noting that South Korean regulators found that Tesla misled consumers  
 9 based on these same advertising tactics). Even when Tesla owners complain to this day and the  
 10 range of their vehicles not matching—or even approaching—the advertised range, Tesla  
 11 summarily disposes of these complaints and cancels range-related service appointments, thereby  
 12 continuing this active deception against the consuming public. *See id.* ¶¶ 85-101; *see also* ¶ 204  
 13 (at p. 53) (“Tesla’s conduct was and *continues to be* fraudulent because it has the effect of  
 14 deceiving consumers.” (emphasis added)). This deception is not minor; an electric vehicle’s range  
 15 is one of the most important features that consumers generally consider when purchasing an  
 16 electric vehicle. *Id.* ¶¶ 4-5, 136, 148, 159, 171, 183, 196, 210, 220. Tesla’s deception, particularly  
 17 about such an important vehicle attribute, causes consumers to purchase Tesla vehicles that they  
 18 otherwise would not have purchased—or pay more for the Tesla vehicles than they otherwise  
 19 would have, had they known the truth about the vehicles’ true range capabilities. *E.g.*, *id.* ¶¶ 9,  
 20 119, 125, 137, 149, 160, 172, 184, 197, 211, 221, 206 (at p. 53), 213 (at p. 54), 226 (at p. 56), 238  
 21 (at p. 59), 249 (at pp. 60-61). Accordingly, because the injunction requested “does not limit itself  
 22 to relief only for class members or some other small group of individuals[,] it encompasses  
 23 consumers generally.” *Mejia v. Dacm, Inc.*, No. G058112, 2020 WL 5525793, \*7 (Cal. Ct. App.  
 24 Aug. 24, 2020) (internal quotation marks and citations omitted).

25 The overwhelming weight of legal authority is in accord that allegations like Plaintiffs’  
 26 claims here sufficiently create a request for public injunctive relief. *See e.g.*, *Nguyen*, 2020 WL  
 27

1 2114937, at \*4 (rejecting Tesla’s argument that Nguyen’s “laser-focus[] on obtaining monetary  
 2 relief” forecloses his request for public injunctive relief where the “FAC contains plenty of  
 3 references to the public harm Plaintiffs allege that Tesla has been causing,” including Nguyen’s  
 4 request to rectify Tesla’s misleading advertisements and marketing disseminated throughout  
 5 California and the United States, including those misrepresentations that were “publicly displayed  
 6 on Tesla’s website”); *Lee*, 2020 WL 10573281, at \*7 (finding it sufficient to establish a request  
 7 for public injunctive relief where plaintiff sought “an injunction regarding Tesla’s allegedly  
 8 misleading marketing practices” which, if granted, “the public would likely benefit”);  
 9 *MacClelland*, 609 F. Supp. 3d at 1038 (finding request “to enjoin Verizon from falsely advertising  
 10 the prices of its wireless service plans to members of the general public via public injunctions  
 11 under the UCL, FAL, and CLRA—the very same statutes and type of relief at issue in *McGill*”  
 12 was a “paradigmatic example of public injunctive relief”); *In re Stubhub Refund Litig.*, No. 20-  
 13 md-02951-HSG, 2021 WL 5447006 at \*11 (N.D. Cal. Nov. 22, 2021) (“Although some of the  
 14 relief Plaintiffs seek may only benefit Plaintiffs or Stubhub consumers who have purchased  
 15 tickets through Stubhub [e.g., an injunction requiring Stubhub to honor its refund policy, to  
 16 preclude Stubhub from unilaterally changing the terms of the guarantee, or to provide clear,  
 17 conspicuous, and extensive corrective advertising regarding the guarantee], the Court finds that  
 18 Plaintiffs are also seeking this ‘paradigmatic example’ of public injunctive relief to preclude  
 19 Defendant from misrepresenting to the general public the protections afforded by its  
 20 FanProtectTM Guarantee”); *Vasquez v. Cebridge Telecom CA*, No. 21-cv-06400-EMC, 2021 WL  
 21 5113217 (N.D. Cal. Nov. 3, 2021) (seeking public injunctions under the UCL, CLRA, and FAL  
 22 because claims were “expressly aimed at enjoining Suddenlink’s false advertising to the general  
 23 public” where he requested enjoining “advertising or quoting an internet service plan price”  
 24 without the deceptive Network Enhancement Fee; “advertising or representing that the prices of  
 25 its internet service plans are fixed and will not increase during a specified promotional period”;  
 26 “stating to members of the public that the Network Service Fee” is a tax, government fee,  
 27

1 regulatory fee, or out of Suddenlink’s control); *Blair*, 928 F.3d at 831 n.3 (holding plaintiff seeks  
 2 public injunctive relief where she seeks “to enjoin future violations of California’s consumer  
 3 protection statutes”); *Mejia*, 2020 WL 5525793 at \*7 (seeking public injunctive relief where  
 4 plaintiff’s prayer sought to enjoin defendant from selling motor vehicles in the state of California  
 5 without first providing the consumer with disclosures mandated by the Civil Code in a single  
 6 document because he does not limit relief “for class members or some other small group of  
 7 individuals; it encompasses ‘consumers’ generally”); *Maldonado v. Fast Auto Loans, Inc.*, 60  
 8 Cal. App. 5th 710, 722 (2021), *cert. denied*, No. 21-31, 142 S. Ct. 708 (2021) (seeking public  
 9 injunctive relief because “it is enough that the requested relief has the purpose and effect of  
 10 protecting the public from [defendant lender’s] ongoing harm”); *McArdle*, 772 F. App’x 575  
 11 (affirming district court’s finding that plaintiff was pursuing public injunctive relief where  
 12 plaintiff was seeking to enjoin defendant from “charg[ing] exorbitant fees for international  
 13 cellular telephone service”); *Olosoni v. HRB Tax Grp., Inc.*, No. 19-cv-03610-SK, 2019 WL  
 14 7576680 at \*4 (N.D. Cal. Nov. 5, 2019) (finding plaintiffs pleaded public injunctive relief where  
 15 they sought to alter “broadly-directed advertising” regarding defendant’s “free filing” offers that  
 16 were “designed to lure in a large swath of the general public,” regardless if only some of whom  
 17 were eligible for the product advertised).

18 Tesla may argue that Plaintiffs fail to “properly” seek public injunctive relief because they  
 19 do not explicitly bring such a request. This would be incorrect. Courts addressing requests for  
 20 public injunctive relief under the CLRA, UCL, and FAL do not require that a plaintiff make an  
 21 express request, where the plaintiffs “seek[] to enjoin future violations of California’s  
 22 consumer protection statutes, relief oriented to and for the benefit of the general public.” *E.g.*,  
 23 *Blair*, 928 F.3d at 831 n.3. Where plaintiffs have alleged that “Tesla caused to be made or  
 24 disseminated throughout California and the United States, through advertising [and] marketing .  
 25 . . statements that were untrue or misleading,” courts have found that plaintiffs validly sought  
 26 public injunctive relief. *Nguyen*, 2020 WL 2114937, at \*4; *see also Lee*, 2020 WL 10573281, at

1 \*7 (finding plaintiff's request for "an injunction regarding Tesla's allegedly misleading marketing  
 2 practices" sufficiently constituted request for public injunctive relief). Here, Plaintiffs have  
 3 alleged that "Tesla's conduct was and continues to be fraudulent because it has the effect of  
 4 deceiving consumers into believing that the vehicles have a much greater vehicle range than what  
 5 could be achieved under normal driving conditions." FAC ¶ 204 (at p. 53). Plaintiffs also allege  
 6 that Tesla's deceptive practices—by making material misrepresentations and omissions of fact in  
 7 its advertising and marketing, *id.* ¶ 203 (at p. 53)—"were capable of deceiving, and did deceive,  
 8 a substantial portion of the purchasing public," *id.* ¶ 219 (at p. 55). As a result, Plaintiffs seek  
 9 injunctive relief under the CLRA, UCL, and FAL, to enjoin Tesla from continuing its deceptive  
 10 and fraudulent marketing. *Id.* ¶¶ 228, 230 (at p. 57), 241 (at p. 59), 251 (at p. 61). Further, in the  
 11 FAC's Prayer for Relief, Plaintiffs request that the Court "[g]rant appropriate injunctive and/or  
 12 declaratory relief, including . . . an order that enjoins Tesla from falsely advertising the estimated  
 13 ranges of its model vehicles." *Id.* at 80; *see also* *Mejia*, 2020 WL 5525793 at \*7 (finding adequate  
 14 a public injunctive relief request based on plaintiff's prayer seeking to enjoin defendant's  
 15 conduct). Tesla's deceptive conduct impacts the public as a whole. If granted, Plaintiffs'  
 16 "requested [injunctive] relief has the purpose and effect of protecting the public" from Tesla's  
 17 ongoing deceptive conduct. *Maldonado*, 60 Cal. App. 5th at 722. Plaintiffs' requests for injunctive  
 18 relief are "paradigmatic examples" of public injunctive relief. *See MacClelland*, 609 F. Supp. 3d  
 19 at 1038.<sup>5</sup>

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22 <sup>5</sup> The "gravamen or essence" of Plaintiffs' current requests for injunctive relief under the CLRA,  
 23 UCL, and FAL are, when "fairly read as a whole," seeking to protect the general public from  
 24 Tesla's ongoing deceptive conduct. *See Freeman Invs. L.P. v. Pacific Life Insc. Co.*, 704 F.3d  
 25 1110, 1115 (9th Cir. 2013); *see also Int'l Norcent Tech. v. Koninklijke Philips Elecs. N.V.*, No. CV  
 26 07-00043, 2007 WL 4976364, at \*8 n.60 (C.D. Cal. Oct. 29, 2007) (noting that plaintiffs need not  
 specifically allege "magic words," where the complaint, "when fairly read as a whole," supports  
 the claim (citations omitted)). To the extent the Court disagrees, Plaintiffs request leave to amend  
 to add explicit requests for public injunctive relief under the CLRA, UCL, and FAL.

27

1       As such, because Plaintiffs seek to eliminate the public dissemination of deceptive  
 2 misinformation regarding Tesla's range and to enjoin Tesla from future violations of California's  
 3 consumer protection statutes, Plaintiffs seek public injunctive relief.

4                   **3. Because the waiver is invalid, the entire UCL, CLRA, and FAL claims  
 5 for relief must be severed for judicial determination—not just the  
 6 request for public injunctive relief.**

7       Finally, the conclusion that Tesla's arbitration provision violates *McGill* means that  
 8 Plaintiffs' claims under the CLRA, UCL, and FAL all belong in this Court per the terms of the  
 9 agreement. Tesla's Arbitration Provision states:

10       If a court or arbitrator decides that any part of this agreement to arbitrate cannot be  
 11 enforced as to a particular claim for relief or remedy, then that claim or remedy  
 12 (and only that claim or remedy) must be brought in court and any other claims must  
 13 be arbitrated.

14       E.g., Ahluwalia Decl., Ex. 1, at 3 (2021 Order Agreement); Ex. 5, at 3 (2022 Order Agreement).  
 15 This language dictates that Plaintiffs' other claims that do not seek to enjoin Tesla's deceptive  
 16 conduct—their claims for breach of express and implied warranties, for breach of contract, for  
 17 fraud, and for negligent misrepresentation—must be arbitrated.<sup>6</sup> However, these arbitrable claims

18       <sup>6</sup> Plaintiffs' other claims under state consumer protection laws—including under the Florida  
 19 Deceptive and Unfair Trade Practice Act, the Illinois Consumer Fraud and Deceptive Practices  
 20 Act, the Illinois Uniform Deceptive Trade Practices Act, the Massachusetts Consumer Protection  
 21 Act, New York's General Business Law sections 349 and 350, and the Washington Consumer  
 22 Protection Act—all seek equitable or injunctive relief to enjoin Tesla's deceptive and fraudulent  
 23 conduct against the consuming public in these states. FAC ¶¶ 265 (at p. 63), 275 (at p. 65), 285 (at  
 24 pp. 67-68), 300, (at p. 70), 319 (at p. 73), 338 (at p. 76), 202 (at p. 78). Similarly, the plaintiffs in  
 25 the related *Corona* case brought claims for public injunctive relief under California's UCL and  
 26 New York's General Business Law section 349. See *Corona v. Tesla, Inc.*, No. 4:23-cv-03902-  
 27 YGR (N.D. Cal.), Compl., ECF No. 1, ¶¶ 1, 4, 28, 31-33, 36, 39. Notably, Tesla did not move to  
 1 compel arbitration of any of the *Corona* plaintiffs' claims, despite their having agreed to arbitrate.  
*Id.*, ECF No. 26 (moving to dismiss but not bringing a motion to compel arbitration despite noting  
 2 that *Corona* plaintiffs were attempting to “avoid [their contractual obligation to arbitrate claims  
 3 relating to their vehicle purchases”]). Tesla likely refused to move to compel arbitration of the  
 4 *Corona* plaintiffs' injunctive relief claims under California and New York law because they were  
 5 not likely to be arbitrable, because doing so would deny consumers a representative action for  
 6 seeking public injunctive relief. The same applies here, at a minimum, to Plaintiffs Porter's,

1 should be severed from Plaintiffs' claims seeking injunctive and equitable relief, including  
 2 Plaintiffs' CLRA, UCL, and FAL claims, which must be fully litigated in this Court.

3 Plaintiffs anticipate that Tesla will argue, as it did in *Nguyen* and *Lee*, that only Plaintiffs'  
 4 request for public injunctive relief should remain in Court, while the remainder of Plaintiffs'  
 5 CLRA, UCL, and FAL claims should be arbitrated, including liability and all other remedies  
 6 sought for such claims. But this is belied by the text of the Arbitration Provision itself, which  
 7 does not contemplate splitting causes of action such that liability determinations are determined  
 8 separately from the relief awarded. While Tesla could have drafted its provision to provide for  
 9 such a scenario, it did not. Instead, it instructs the opposite: only "*other claims*,"—that is, causes  
 10 of action other than those seeking public injunctive relief, must be arbitrated.

11 Tesla's pronouncement that "*other claims*" be arbitrated—and not other remedies—is  
 12 dispositive. As the Ninth Circuit held when evaluating a similar severance provision, a "claim"  
 13 refers to an entire cause of action, not simply a request for relief. In *Blair*, the Ninth Circuit  
 14 rejected the defendant's argument that the court should sever liability from the remedy. 928 F.3d  
 15 at 831. In so holding, the court noted, "[The defendant] reads 'claim for relief' in the severance  
 16 clause to refer only to a particular remedy, not to the underlying claim" but this reading was  
 17 "unnatural and unpersuasive." *Id.* Thus, when Tesla states that "*other claims* must be arbitrated,"  
 18 and not "*other remedies*," this reasonably refers to Plaintiffs' breach of warranty, breach of  
 19 contract, fraud, and negligent misrepresentation claims, and not Plaintiffs' request for damages  
 20 under the CLRA, UCL, and FAL (or other claims seeking injunctive relief on behalf of the  
 21 public). Indeed, Tesla's decision not to use the phrase "*other claims or remedies*"—a phrase it  
 22 used *twice* previously in the same sentence—must be understood to be intentional.

23  
 24 \_\_\_\_\_  
 25 Perez's, and Estepanian's CLRA, UCL, and FAL claims, and to Plaintiff Nadir's General Business  
 26 Law sections 349 and 350 claims, all of which seek injunctive relief on behalf of the general  
 27 public—and would potentially apply to all other Plaintiffs' claims under their state's consumer  
 protection laws, because they all likewise seek injunctive relief on behalf of the general public.

1 Predictably, Tesla will attempt to disavow the latter half of its severance provision and  
 2 rely exclusively on the first half of the provision, which states that if a court determines the  
 3 arbitration provision cannot be enforced as to a “claim for relief or remedy,” “only that claim or  
 4 remedy must be brought in court.” *E.g.*, Ahluwalia Decl., Ex. 1, at 3 (2021 Order Agreement);  
 5 Ex. 5, at 3 (2022 Order Agreement). This provision does not, as Tesla will surely contend, mean  
 6 liability should be severed, as opposed to severing by “claim.” To start with, the provision is  
 7 nonsensical. A “remedy,” by itself, cannot be “brought” in court at all. A “remedy” can be  
 8 *awarded* by a court, but only in response to a finding of liability with respect to a given cause of  
 9 action. A plaintiff may not “bring” an action for public injunctive relief without tethering that  
 10 request for public injunctive relief to an underlying legal claim—as Plaintiffs have done here.  
 11 Thus, Tesla’s mandate that a plaintiff “bring” a “remedy” in court makes no sense, and it is the  
 12 latter half of the severance provision mandating that “*other claims*” be arbitrated that should be  
 13 given effect.

14 This conclusion is further necessitated by the Arbitration Provision’s use of the verb “to  
 15 bring,” which commonly means to initiate or cause to exist. *E.g.*, Ahluwalia Decl., Ex. 1, at 3  
 16 (2021 Order Agreement); Ex. 5, at 3 (2022 Order Agreement) (“[T]hat claim or remedy (and only  
 17 that claim or remedy) *must be brought in court . . .*”). The verb “to bring” describes adjudicating  
 18 a particular claim in court from its inception, as opposed to partially litigating a claim in  
 19 arbitration, and then *continuing* to litigate the remainder of the claim in court. Tesla did not say,  
 20 as it could have, that “only that claim or remedy” could be *decided* by a court after an arbitrator  
 21 had made all preliminary determinations, including as to liability. Instead, it stated “a claim or  
 22 remedy” must be *brought* in court, and “*any other claims*” must be arbitrated. This can have only  
 23 one meaning: Plaintiffs’ claims seeking public injunctive relief (including their CLRA, UCL, and  
 24 FAL claims) are rightfully “brought” in court, and Plaintiffs’ remaining claims must be arbitrated.

25 Numerous courts, which have reviewed language similar to Tesla’s that permits severance  
 26 of a “claim or remedy (and only that claim or remedy),” have required the severance of plaintiffs’  
 27

1 entire CLRA, UCL, and FAL claims, and not just their request for public injunctive relief. *See*  
 2 *e.g., Jack*, 91 Cal. App. 5th at 1209 (following *Blair* and finding severance clause that required  
 3 “that claim (and only that claim) must be severed from the arbitration and may be brought in  
 4 court” meant that “plaintiffs’ claims (that is, their three causes of action under the Consumer  
 5 Legal Remedies Act, false advertising law, and UCL, respectively) cannot be arbitrated and may  
 6 be brought in court” because “it is far more reasonable to read ‘claim for relief’ to refer to a  
 7 person’s claim and not to a particular remedy requested in respect to a claim”); *In re StubHub*  
 8 *Refund Litig.*, 2022 WL 1028711 at \*2 (N.D. Cal. Apr. 6, 2022) (following *Blair* and finding  
 9 severance clause that required “that claim (and only that claim) must be severed from arbitration  
 10 and may be brought in court” meant that “the entire UCL, CLRA, and FAL claims must be severed  
 11 for judicial determination, and not just the request for public injunctive relief”); *McBurnie*, 2022  
 12 WL 17342195 at \*5 (following *Blair* in severing “each claim, in its entirety” for judicial  
 13 determination where arbitration agreement prohibited public injunctive relief in violation of  
 14 *McGill* in action alleging violations of the CLRA and UCL arising from defendant’s charging of  
 15 excessive fees in connection with its rent-to-own furniture business). There is little reason to  
 16 divert from these cases, which were decided based on similar language and circumstances. At a  
 17 minimum, the Court should refuse to compel to arbitration Plaintiffs’ CLRA, UCL, and FAL  
 18 claims.

19 **V. CONCLUSION**

20 For the reasons above, Plaintiffs respectfully request that the Court deny Tesla’s Motion  
 21 to Compel Arbitration on an Individual Basis. In particular, Plaintiffs request that the Court refuse  
 22 to compel to arbitration any of Plaintiffs’ claims seeking public injunctive relief, including  
 23 Plaintiffs’ CLRA, UCL, and FAL claims.

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1 DATED: December 18, 2023

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1 **CERTIFICATE OF SERVICE**

2 I, William A. Ladnier, hereby certify that on December 18, 2023, I caused a true and  
3 correct copy of the foregoing Plaintiffs' Response in Opposition to Defendant Tesla, Inc.'s  
4 Motion to Compel Arbitration to be served upon all counsel of record through the Court's ECF  
5 system, including:

6

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